Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2001

ANDREW G. MALONEY,

Petitioner,

v.

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT OF THE STATE
NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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April 2002

QUESTIONS PRESENTED

WHETHER THE APPELLANT HAS BEEN DENIED HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAW RESULTING FROM THE IMPOSITION OF A MORE SEVERE SANCTION FOR A DISCIPLINARY INFRACTION THAN THAT GENERALLY IMPOSED BY THE JUDICIAL DEPARTMENT IMPOSING THE SANCTION, AS WELL AS THE VARIOUS DEPARTMENTS THROUGHOUT THE STATE FOR SIMILAR INFRACTIONS?

WHETHER THE APPELLANT HAS BEEN DENIED DUE PROCESS OF THE LAW EMANATING FROM HIS COUNSEL'S MATERIAL OMISSIONS OF SEVERAL EVIDENTIARY DOCUMENTS, AS WELL AS THE COMMISSION OF SEVERAL ERRORS AND OMISSIONS IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL?

WHETHER THE NEW YORK STATE COURT OF APPEALS ERRED IN HOLDING THAT THE ORDER ISSUED BY THE APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT, DATED AUGUST 7, 2001, IS NOT A FINAL ORDER WITHIN THE MEANING OF THE CONSTITUTION OF THE STATE OF NEW YORK?

PARTIES TO THE PROCEEDING

The Petitioner in this case is ANDREW G. MALONEY, a former member of the Bar of the State of New York.

The Respondent is the Grievance Committee for the State of New York for the Ninth Judicial District.

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Andrew G. Maloney, Petitioner, respectfully petitions for a writ of

certiorari to review the Order of the New York State Court of Appeals, denying Petitioner appellate review.

OPINIONS BELOW

The Order of the New York State Court of Appeals dated March 26, 2002 denying Motion for Leave to Reargue is unreported. The January 15, 2002, Decision and Order of the New York State Court of Appeals granting Leave to Reargue, but dismissing the Petition on procedural grounds has been designated for publication, but is not yet reported. The Decision and Order of the Court of Appeals dated October 23, 2001 denying Leave to Appeal has been designated for publication, but is not yet reported. The decision of the Appellate Division, Second Judicial Department for the State of New York dated August 7, 2001 is unreported. The decision of the Appellate Division, Second Judicial Department for the State of New York dated April 16, 2001, is reported at 723 N.Y.S.2d 674 (A..D. 2nd Dept. 2001).

JURISDICTION

On January 15, 2002 the New York State Court of Appeals granted the Petitioner's Motion for Leave to Reargue, but dismissed the Petition on the grounds that the decision appealed was not a final decision within the meaning of the Constitution. On March 26, 2002, the New York State Court of Appeals, denied Petitioner's Motion for Leave to Reargue. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

New York Constitution, Art.VI, Sec. 3

New York Civil Practice Law & Rules, Sec. 2221(e)

New York Civil Practice Law & Rules, Sec. 5501

New York Civil Practice Law & Rules, Sec. 5701(2)

U.S. Const., Fifth Amendment

U.S. Const., Sixth Amendment

U.S. Const., Fourteenth Amendment

28 U.S.C. Sec. 1257(a)

STATEMENT OF THE CASE

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, states have the right to regulate businesses, including the professional licensing and conduct of attorneys. However, in the case at bar, there has been an inconsistent application of the sanctions imposed by the New York State Judicial Department issuing the sanction, as well a substantive variation among the various jurisdictions on a state-wide, as well as nationwide basis for the same infractions. The best interests of justice dictate that a uniform system of sanctions be formulated, thereby eliminating the unequal application of the law throughout the state, as well as the nation.

1. Background. The charges brought against Petitioner emanate from a sua sponte investigation commenced in 1996 by the Disciplinary Committee for the First Judicial Department ("DDC") of the State of New York resulting from a returned check drawn on Petitioner's IOLA account in May 1996. Petitioner fully cooperated with Petitioner's investigation and voluntarily attended two depositions on July 15, 1997 and June 16, 1998 at the offices of the Petitioner, providing numerous files and bank records in connection with the Petitioner's investigation. Petitioner

expanded the scope of its investigation that resulted in a complete audit of Petitioner's escrow and business accounts, and in essence, his practice, from 1994 to 1999.

On or about November 21,1999, Petitioner was served with a motion for interim suspension, along with a Petition alleging seventy five charges of misconduct. Many of the charges were the result of technical errors in the Petitioner's maintenance of his escrow account based upon his misunderstanding as to the true nature and operation of a trust account and several mathematical errors. Most of the charges were non-related to the subject of the initial inquiry. It is also important to note that many of the charges were duplicitous in nature and were the result of several different charges being brought relating to each incident of alleged misconduct. Petitioner's motion for interim suspension was denied by the Appellate Division of the State of New York, Second Judicial Department ("Appellate Division"), by Order dated December 27, 1999 (unpublished) (A-1) finding that the Petitioner had failed to establish that Petitioner was an immediate threat to the public and appointed a Special Referee to "hear and report" his findings on the issues raised in the Petition to the Appellate Division.

Immediately prior to and during the hearing, several of the charges against Petitioner were withdrawn. Several of the charges were also amended one day prior to the scheduled hearing despite Petitioner's objection to same during the course of the hearing. It should be noted that despite the numerous charges brought, there was neither a complaint filed against the Petitioner by anyone of his clients, nor was anyone harmed by any of the Petitioner's actions. Moreover, there was no finding of venality by the Referee hearing the matter, who classified many of the actions leading to the charges as "mistakes".

Subsequent to the evidentiary hearing held on March 8 & 9, 2000, by Report dated July 19, 2000, the Special Referee adopted that Report submitted by the Petitioner, and sustained all charges then pending against Petitioner despite Petitioner's submission of credible documentary evidence

at trial and to his counsel subsequent to trial, that would have exculpated him from several of the pending charges. Apparently, the documents, which included supplementary bank records which were provided to Petitioner's former Counsel, were never submitted to the court by Petitioner's former counsel, to Petitioner's detriment. Moreover, there is no record on file that confirms whether Petitioner's Proposed Report, as requested by the court, was ever submitted to the Referee by Petitioner's former counsel. Consequently, based upon information and belief, the Proposed Report submitted by the Petitioner was accepted and adopted by the Referee hearing the matter, thereby setting the tone for strong imposition of sanctions that was to be imposed by the Appellate Division.

A decision was issued on or about April 16, 2001 (A-3) by the Appellate Division disbarring Petitioner from the practice of law, five years subsequent to the commencement of the initial investigation, despite the court acknowledging in its decision, several mitigating factors, including, but limited to, Petitioner's cooperation with the Petitioner, lack of any harm to any client, lack of any complaint by any client, Petitioner's expression of remorse, contrition, lack of likelihood of said matter reoccurring, and Petitioner's service to the bar and community which was noted as being numerous. Petitioner subsequently filed a Motion for Reconsideration of the Severe Sanction Imposed on or about May 16, 2001 with the Appellate Division (A-12).

During the course of submission of the underlying papers to the Appellate Division, Petitioner was represented by counsel, namely, Law Offices of Jerome Karp, P.C.. Upon the submission of the Motion for Reconsideration, Petitioner appeared, pro se, and raised several issues which were not previously raised in the original submission of documentation to the court by Petitioner's prior counsel, including, inter alia, several violations of Petitioner's constitutional rights within the context of the hearing, as well as the failure of the Petitioner's prior counsel to submit several critical pieces of documentary evidence during and after the evidentiary hearing to the court that would have exonerated Petitioner from several of the charges that were pending, and may have had the effect

of the court tempering the imposition of the harsh sanction of disbarment for the infractions committed. Petitioner also raised the issue of the inconsistent application of the imposition of sanctions for similar infractions by the Appellate Division, Second Department, the judicial district who ruled on the matter, and several judicial departments throughout the State of New York. Said issues were not the subject of prior review by the court in this instant proceeding.

During the course of his review of his file at the Appellate Division prior to the submission of Reply papers in connection with his Motion for Reconsideration, Petitioner discovered several irregularities. Said irregularities included, but were not limited to, omissions by his former counsel of several character affidavits from several clients whose funds were the subject of the charges brought which would have clearly confirmed for the court that the Petitioner that said clients held Petitioner in high esteem and were completely satisfied with the level of service rendered. Several letters from distinguished members of the legal community and community at large attesting to Petitioner's outstanding reputation in the community and veracity for truthfulness were also admitted despite his counsel's representation that said items would be included in their submissions. Petitioner also discovered that several items were wrongfully included in the court record that were to be excluded from the record by the Petitioner (e.g. portions of the deposition transcripts) pursuant to a stipulation entered into between the parties at the evidentiary hearing, omission of several bank records confirming that the Petitioner's escrow accounts had been closed and funds totally disbursed which would have exonerated Petitioner from several of the charges, and most glaringly, Petitioner's former counsel's failure to respond to Petitioner's Motion for the Imposition of Sanctions which was returnable on August 25, 2000. In fact, Petitioner's Counsel did not submit anything on Petitioner's behalf until December 2000, several months after the return date on the original motion. As confirmed in the Respondent's Opposition papers to said motion, Petitioner's Counsel had not obtained an extension of time to

submit said documents beyond September 2000. Said omissions and errors amounted to Petitioner not having the benefit of counsel during a critical stage of the pending matter in violation of his Constitutional, Sixth Amendment Right to Counsel, thereby adversely impacting upon the Appellate Division's review of the Petitioner's case.

The Appellate Division, Second Department, issued a one sentence decision dated August 7, 2001, denying the Petitioner's Motion for Reconsideration, despite all of the new evidence and arguments that were submitted to the court in the subject motion (A-8). Petitioner subsequently filed a Motion for Leave to Appeal to the New York State Court of Appeals. Said motion was denied as being untimely as set forth in the Decision and Order issued on October 23, 2001 by the New York State Court of Appeals (A-9).

Upon Petitioner filing a Motion for Leave to Reargue the October 23, 2001 Decision and Order, the Court of Appeals ruled that the original Motion for Leave to Appeal was timely, but dismissed that part of the Motion for Leave to Appeal seeking review of the underlying proceeding upon the ground that the "order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution." Said ruling is set forth in an Order rendered on January 15, 2002, which is the order that is the subject of this instant motion (A-10).

A subsequent Motion for Leave to Reargue was filed by the Petitioner, which included, inter alia, detailed argument as to why the August 7, 2002 Decision and Order was a "final order" within the meaning of the New York State Constitution and was therefore subject to review by the Court of Appeals. Said motion was denied by the Court of Appeals in an Order (without a decision) dated March 26, 2002 (A-11).

REASONS FOR GRANTING THE WRIT

2. Finality of the Appellate Division's August 7, 2001 Order. In its Order dated August 7, 2001, the New York State Supreme Court, Appellate Division denied Petitioner's Request for Reconsideration of the Sanction Imposed. Upon applying to the New York State Court of Appeals for Leave to Appeal, the Court of Appeals, upon discretionary review, denied the motion as being untimely. Upon Motion for Reargument, the Court held that the motion was timely, but denied that portion of the motion seeking Leave to Reargue based upon the grounds that the decision was not a final decision within the meaning of the Constitution. Upon motion for Reargument of said decision, the Court denied said motion, without a decision. Thus, the substance of the Petitioner's motions were never addressed by the Court of Appeals as result of the Court denying said motions based upon procedure, as well as discretionary review, as opposed to the merits of the arguments presented.

Petitioner respectfully submits that the ruling of the Court of Appeals on this issue was erroneous, and amounted to the denial of due process of the law in violation of the United States Constitution.

New York Constitution, Article VI, Sec. 3 (6), provides in relevant part that :

> Appeals may be taken to the Court of Appeals in civil cases from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding, but which is not appealable under paragraph 1 of this subdivision where the Appellate Division or Court of Appeals shall certify that in its opinion, a question of law is involved and ought to be reviewed by the Court of Appeals. Such an appeal may be allowed by application . . . or (b) directly to the Court of

Appeals. **Such an appeal shall be allowed when required in the interest of substantial justice."** (Emphasis added).

New York Civil Practice Law & Rules ("CPLR"), Sec. 5611 provides in relevant part that "if the appellate division disposes of all the issues in the action, its order shall be considered a final one..." It is also well established that the finality of an appellate division order dismissing an appeal to that court is determined by an examination of the finality of the underlying order (see Jacob and Valeria Langeloth Found. v. Dickerson Pond Assocs. 74 NY2d 841).

CPLR, Sec. 5501 "determines just how much is opened for review upon an appeal from a final judgment, and for this purpose, an order that amounts to the equivalent of a judgment in that it disposes of the whole case will also qualify as a judgment and earn the same scope of review." Siegel, New York Practice (3rd Ed., Sec. 530 at p.871-872). In this particular instance, it is clear that the Appellate Division's August 7, 2001 decision was final in that it disposed of all of the issues raised in the Motion for Reconsideration which were new, distinct and separate from the issues previously ruled upon in the Appellate Division's April 16, 2002 decision. As such, said decision is appealable to the Court of Appeals pursuant to CPLR, Sec. 5701 (2) and 2221(e). Moreover, in light of the newly discovered evidence and constitutional questions of law with state-wide implications which were raised for the first time in the contents of the aforesaid motion, it is clear that the Appellate Division's ruling on said facts and issues constituted a "new" final ruling within the meaning of the statute.

It has been also held that the Court of Appeals may review the facts when the Appellate Division in reversing a final order in special proceeding makes new findings of fact, and where such findings are not separately stated, they may be implied. People v. Parkin, 263 N.Y.428, 189 N.E. 480. In this instance, although the prior ruling was not reversed as in Parkin, id.,

by implication, a new set of findings were made as to the new evidence submitted, and as such, it is subject to appeal to the Court of Appeals pursuant to the relevant statute and case law in the State of New York.

Based upon a clear demonstration of the material omissions by the Petitioner's Counsel in the underlying proceedings, particularly counsel's failure to submit a Proposed Findings of Facts to the referee hearing the matter, as well as failing to respond to the Petitioner's Motion for the Imposition of Sanctions, the "best interests of substantial justice" dictate that Petitioner should have been granted appellate review of the irregularities that have effectively denied him his constitutional right to counsel as provided by the Sixth Amendment to the United States Constitution, as well as the decision which has effectively deprived him of his livelihood and ability to support his family. Moreover, the court's denial of judicial review of the

3. Unequal Dispensation of Justice With Nationwide Implications. Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, states have the right to regulate businesses, including the professional licensing and conduct of attorneys. However, inherent in the state's authority to exercise its police powers is the responsibility to be reasonable and not arbitrary in the promulgation, as well as application of said regulations. In this instance, it is apparent from the inconsistent dispensation of sanctions for escrow account infractions by the New York State Courts, that the state has overlooked this fundamental constitutional premise.

In this particular instance, as previously outlined in the Petitioner's Motion for Reconsideration addressed to the Appellate Division, it is clear that there is an inconsistent application of the law when it comes to the imposition of sanctions relating to escrow account violations where no one has been harmed or has complained of the attorney who is the subject of the inquiry. Said sanctions have varied anywhere from public censure to

disbarment for the same infractions, depending upon the judicial district the matter is pending. In some instances, the same judicial district has imposed a various degree of sanctions for the same infractions, as in the Second Judicial Department, the Department issuing the underlying decision that is the subject of this instant motion. Variations in the application of severity of sanctions for similar infractions have been also prevalent throughout the United States. Without a clear pronouncement as to the level of sanctions to be imposed in such instances, the unequal imposition of sanctions for the same or similar infractions will continue to proliferate throughout the various judicial departments in the State of New York, as well as throughout the nation in violation of the equal protection clause of the United States Constitution.

It is well established that the strong sanction of disbarment is readily applied in most jurisdictions, particularly in the Second Judicial Department of New York State , when an attorney has committed escrow violations to the detriment of his clients. See In re Perez, 645 N.Y.S.2d 859, 223 A.D.2d 330 (App. Div. 2d Dept. 1996), wherein attorney was disbarred when he failed to promptly deliver funds or property to which client was entitled, failed to account for funds entrusted to him, failed to cooperate with grievance committee, defaulted in answering charges of professional misconduct; Matter of DiMisa, 639 N.Y.S.2d 835, 218 A.D.2d 441 (App. Div. 2d Dept. 1996), attorney disbarred who *failed to return any portion of downpayment* for real estate transaction entrusted to him and failed to promptly deliver to his client funds which had been entrusted to him as a fiduciary; *In the Matter of William Geier*, 709 N.Y.S.2d 195, 274 A.D.2d 103 (App. Div. 2d Dept. 2000), holding attorney who converted escrow funds to the detriment of his client was disbarred.

When determining the appropriate sanction to be imposed against a Petitioner for escrow account violations, historically, there are a number of different factors that the court examines in mitigation, including, but not

limited to: venality, cooperation with the petitioner's investigation, contrition, remorse, harm to client, seriousness of violation, prior history, likelihood of infraction recurring, character letters, circumstances impacting upon the Petitioner's actions, etc. The precedents in the Second Judicial Department indicate that the Second Judicial Department has a history, of imposing sanctions ranging from public censure to disbarment in the most serious cases of escrow violations when the client has been harmed, as noted above. Also see *In the Matter of Robert G. Whiteman*, 651 N.Y.S.2d 555, 226 A.D.2d 20 (App. Div. 2d Dept. 1996), holding that Petitioner attorneys, who converted funds entrusted to them on behalf of a client, failed to maintain required records for their attorney IOLA account and failed to properly file retainer closing statements with the Office of Court Administration, are guilty of professional misconduct, and, in consideration of the evidence offered in mitigation, they are censured; *In the Matter of Kenneth Popper*, 709 N.Y.S.2d 579, 274 A.D.2d 28 (App. Div. 2d Dept. 2000), holding Petitioner's mishandling of escrow account warranted censure, in light of attorney's candor and cooperation, his expressed remorse, total lack of venality of his mistake, his immediate action in covering shortfall in his escrow account, absence of any prior disciplinary history, unlikelihood that such conduct would ever be repeated and substantial other evidence offered in mitigation. *In the Matter of Scattaretico-Naber*, 682 N.Y.S.2d 67, (App. Div. 2d Dept. 1998), holding that attorney's failure to designate her special account as escrow account, to maintain required bookkeeping records related to her special account, to safeguard funds that were entrusted to her to be held in escrow, and her commingling of personal and client funds warranted censure, in light of attorney's cooperation with disciplinary investigation, expressed remorse, corrective actions and previously unblemished record and fact that rule violations were technical, unintentional, and harmed no clients; *In the Matter of Robert J. Ponzini*, 694 N.Y.S.2d 127, 259 A.D.2d 142, opinion corrected on reargument, 701 N.Y.S.2d 911, 268 A.D.2D 478 (App. Div. 2d Dept. 2000), and *In the Matter of Robert W. Spencer*, 694 N.Y.S.2d 426m 259 A.D.2d 218m opinion corrected on reargument, 268 A.D.2d 481

(App. Div. 2d Dept. 2000), holding that disbarment was "excessive discipline" because of the absence of any monetary loss to clients for letting escrow accounts fall to below zero, wherein both attorneys failed to oversee record keeping of their firm's escrow account on multiple occasions and causing or failing to prevent deposit of funds held on behalf of other persons when account had a negative balance which adversely reflected upon their fitness to practice law, where attorneys knew or should have known that deposit of such funds while account had a negative balance would result in consumption or conversion of part or all of such funds. The sanction imposed was a one year suspension; *In the Matter of Gambino*, 619 N.Y.S.2d 305, 205 A.D.2d 305 (App. Div. 2d Dept. 1994) holding that one year suspension was appropriate where Petitioner's misconduct included failing to maintain a duly constituted escrow account, commingling funds of clients and others with personal funds, failing to designate sufficiently his attorney escrow account, making withdrawals to cash from attorney escrow account and failing to maintain and/or produce records for attorney escrow account, and failing to account for interest on funds held in escrow; *In the Matter of Wynne*, 260 A.D.2d 23, holding Petitioner attorney who failed to properly maintain his escrow account, improperly converted funds entrusted to him as a fiduciary, is guilty of professional misconduct and upon consideration of factors in mitigation, including Petitioner's remorse and lack of venality, his previously unblemished record, his cooperation with the grievance committee's investigation, and character letters submitted on his behalf, Petitioner was suspended for a period of two years; Matter of Forman, 680 N.Y.S.2d 612 (App. Div. 2d Dept. 1998), holding that attorney's conduct in failing, on multiple occasions, to safeguard funds entrusted to him as a fiduciary and in improperly commingling his personal funds with funds entrusted to him as a fiduciary warranted a suspension from practice of law for a two year period, given the circumstances, including attorney's unblemished record, his cooperation with investigation, lack of harm to clients, changes in attorney's office staff and escrow procedures and overwhelming character evidence.

In this case at bar, despite the numerous charges brought against the Petitioner for escrow account violations, there has been no finding of venality made by the court. Moreover, Petitioner has fully cooperated with the Petitioner's investigation that lasted more than four (4) years, Petitioner has expressed considerable remorse and contrition for his actions, no client has complained of Petitioner, no client has been harmed or prejudiced in any manner by Petitioner's actions, Petitioner has clearly demonstrated and admitted to his lack of understanding and/or experience on the proper use of an escrow account at the time of the infractions (1994-1996). The Referee hearing the matter also classified the actions of Petitioner as "mistakes" which was acknowledged by the Appellate Division in their decision. Petitioner also submitted numerous Affirmations and Character letters from distinguished members of the bench, including the Honorable George Bundy Smith from the New York State Court of Appeals, Honorable Clark Richardson, Supervising Judge of the New York State Family Court, Bronx County, Honorable Priscilla Hall, New York State Supreme Court, Kings County, Honorable Louis Barone, New York State Supreme Court, Westchester County, and Honorable Doris Ling-Cohen, New York City Civil Court. The Honorable Theodore Jones, New York State Supreme Court , and the Honorable Harvey Sklaver, retired Judge of the New York State Family Court, Bronx County, who is also Petitioner's former employer, also testified at Petitioner's hearing attesting to his good character and reputation in the community. Character affirmations and affidavits were also submitted from various bar and community leaders who are acquainted with Petitioner's work, good character and commitment to servicing of the indigent, including, but not limited to, C. Virginia Fields, Manhattan Borough President, Dean John Feerick, Dean of Fordham Law School and former President of the Association of the Bar of the City of New York, Roslyn Fink, Esq., former President of the New York County Lawyers Association, Norman Reimer, Esq., Vice President of the New York County Lawyers Association, Renaye Cuyler, Esq., President of the Metropolitan Black Bar Association, Arlene Gordon Oliver, Esq., a partner in a reputable firm in Westchester County and

President of the Westchester County Black Bar Association, Ann Takahashi, Director of the Youth Empowerment for Success, a program run by the Children's Aid Society in collaboration with the New York State Family Court, Kings County, as an alternative to incarceration for youth. Several clients whose funds were the subject of the instant action also submitted character affidavits on Petitioner's behalf attesting to his good character and reputation, including, Dr. Farida Ali, Ed Oliver, Shirley Gray and Guillermo Brown. Petitioner also submitted evidence of his exceptional service to the bar and community including, but not limited to, serving as delegate to the Judicial Screening Panel for the Metropolitan Black Bar Association ("MBBA") and the Association of the Bar of the City of New York, (1990-1991 & 1998-1999), President of the MBBA (1993-1994), Delegate to the Network of Bar Leaders (1993-1994),Vice Chairman of the Board of Directors of the MBBA (1994-1996), Vice Chairman of the Advisory Board of Directors for the New York Urban League, Manhattan Branch (1994-1996), Chairman of the Board of the Advisory Board of the New York Urban League, Manhattan Branch (1996-1998), member of the Central Board of Directors for the New York Urban League (1995-1998) member of the Board of Trustees and member of several standing committees for the New York County Lawyers Association (1997-2000), member of the Board of Directors for Manhattan Neighborhood Network, Manhattan's Public Access Television (1999-Present). Petitioner has also served as a volunteer and mentor to several organizations, including, but not limited to "The Door" a non-profit organization providing services and housing to drug addicts and prostitutes, Practicing Attorneys and Law Students (P.A.L.S.), Youth Empowerment for Success, an alternative program to incarceration for troubled youth, Harlem Dowling Westside Center for Children, Association of the Bar of the City of New York's Haitian Asylum Project wherein Petitioner was featured in a video moderated by the Honorable Judith Kaye, the Chief Judge of the New York State Court of Appeals as an example of the bar's commitment to servicing the indigent at the Association of the Bar's 125th Anniversary at Lincoln Center. He has been also an active contributing member to several

standing committees in the Association of the Bar (Council on International Affairs, Women in the Courts, Federal Task Force on Race and Gender in the Courts, Minority Lateral Recruitment Conference, co-founder, Lawyers In Transition, etc.) New York County Lawyers Association, as well as the MBBA. He has served as a coordinator, panelist and moderator for several continuing legal education programs sponsored by various bar associations.

Given his short tenure as a member of the bar, it is clear that Petitioner's commitment and contributions to the bar and the community are exemplary and exceeds the amount of contributions made by a majority of his peers during their entire career. Petitioner also submitted several supplemental letters, Character Affirmations from his Pastors, Pastors Clinton and Sarah Utterbach, and several practicing attorneys and lay persons attesting to his good character and reputation in the community.

Despite the presentation of these various letters, affirmations and affidavits attesting to Petitioner's good character and reputation, a partial listing of his many contributions to the legal community and community at large, coupled with the fact that no one was harmed or complained of the Petitioner, his clear expression of remorse, contrition, cooperation with the Petitioner's investigation, lack of any finding of venality, inexperience in handling escrow accounts, years of work in the public sector, lack of likelihood that said transgressions will be repeated, lack of any personal profit from his misconduct and judicial precedents that have imposed lesser sanctions than that imposed herein, Petitioner was given the severe sanction of disbarment. Said sanction varies from the established precedents in the Second Judicial Department for similar infractions as well as throughout the State of New York. Moreover, many of the precedents that imposed a much lesser sanction, did not have many of the mitigating factors present that the Petitioner has herein. See *In the Matter of Robert G. Whiteman*, Id.; *In the Matter of Robert J. Ponzini*, 694 N.Y.S.2d 127, 259 A.D.2d 142, opinion corrected on reargument, 701 N.Y.S.2d 911, 268 A.D.2D 478 (App. Div. 2d Dept. 2000), Id.; *In the Matter of Gambino*,

619 N.Y.S.2d 305, 205 A.D.2d 305 (App. Div. 2d Dept. 1994).

The sanction imposed against the Petitioner in the instant matter for mishandling his escrow account also appears to vary from the precedents established in several other jurisdictions throughout New York State, including the First Judicial Department. See *In re Hartman*, 694 N.Y.S.2d 34 (App. Div. 1st Dept. 1999), holding that attorney's neglect of legal matter, failure to preserve client funds in attorney escrow account, writing of three checks to cash from that account, failing to cooperate with the Disciplinary Committee's investigation, warranted public censure where all attorney's misconduct lacked venality, and where attorney was committed to maintaining a scaled down law practice from her home; *In re Byler*, 712 N.Y.S.2d, 500 (App. Div. 1st Dept. 2000) holding attorney's misconduct in obtaining a tax refund for a client and retaining it for his personal use instead of returning it to the client or depositing it in escrow and in failing to promptly pay the client those funds in his possession when the client objected to the attorney paying the money to himself warranted a one year suspension; *In re Terzis*, 712 N.Y.S.2d 99 (App. Div. 1st Dept. 2000), holding a one year suspension, which was the same sanction imposed in Connecticut, was appropriate reciprocal discipline for attorney who negligently misappropriated condominium association funds while serving as association president; In re Munzer, 697 N.Y.S.2d 49 (App. Div. 1st Dept. 1999), holding, attorney's admitted conversion of client funds being held in his escrow account warranted a one year suspension given his return of the converted funds before they were required in a real estate transaction, given character evidence demonstrating his reputation for competence and integrity, great personal stress and expression of great remorse and shame for having invaded escrow; In the Matter of Rabin, 667 N.Y.S.2d 368, 239 A.D.2d 368 (App. Div. 1st Dept. 1998), imposing a two year suspension upon an attorney who improperly withdrew funds from law firm's special account to pay business and personal expenses, writing checks to cash from special account, and failing to return client funds in light of mitigating facts that mishandling funds was result of

carelessness, rather than intent to convert and Petitioner's unblemished record. In re Albanese, 710 N.Y.S.2d 594 (App. Div. 1st Dept. 2000), holding attorney's intentional conversion of client funds, intentional submission to court of dishonest and misleading affirmation, conduct prejudicial to the administration of justice, failure to maintain identity of escrow funds and commingling of personal and escrow funds, failure to maintain escrow records and records for his operating account warranted a four year suspension given the mitigating circumstances and apparent malevolent intent of complainant.

The Third and Fourth Judicial Departments are also at variance with the imposition of sanction of disbarment in the instant case resulting from the mishandling of his escrow account. See In re Joseph, 637 N.Y.S.2d 490, 223 A.D.2d 999 (App. Div. 3d Dept. 1996), later proceeding 654 N.Y.S.2d 476, holding attorney who seriously mismanaged his escrow accounts, thereby violating various provisions of McKinney's Code of Professional Responsibility would be censured as a result of several mitigating factors, including personal problems, his role as a corporate officer as contributing to his inattention to proper management of his escrow accounts, no harm to any clients, affidavits of good character and participation in the department's Law Guardian Program and professed remorse; In re MacKinnon, 637 N.Y.S.2d 321, 223 A.D.2d 807 (App. Div. 3rd Dept. 1996), holding censure was appropriate penalty where attorney commingled client and personal funds in his escrow account, failed to maintain adequate books and records for his client escrow account, failed to limit business relations with clients by making loans to clients without full disclosure in light of mitigating factors that included no harm to any client, escrow deficiencies resulted from poor bookkeeping rather than venal motive, affirmative steps to assure future compliance, good reputation and unblemished disciplinary record.

Petitioner respectfully submits that without the granting of a Writ for Certiorari by the Honorable Court herein, it is likely that the inconsistent application of the imposition of sanctions for escrow account infractions will continue in contradiction of the judicial goal of eliminating

"confusion into the body of law from the frequent recurrence of occasions where the same question will come up, the public interest and the interests of jurisprudence would justify, and perhaps, require the granting of a certificate" (of appeal). Sciolina v. Erie Preserving Company, 151 N.Y. 50, 53.

CONCLUSION

Given the inconsistent application of the sanctions for mishandling attorney escrow accounts as applied herein by the Second Judicial Department of the State of New York and by several different judicial departments as set forth in the case law noted herein, the denial of due process, ineffective assistance of counsel and nationwide implications based upon a lack of clear pronouncement of the standard of law to be applied in similar instances, Petitioner respectfully requests that a Writ of Certiorari be granted by this Honorable Court in the interests of substantial justice, and for such other and further relief as this Honorable Court may deem proper and just.

Respectfully submitted.

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